GANESAN SUBRAMANIAM v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD SHARIFF ABU SAMAH JC
[CRIMINAL APPEAL NO: 42(K)-46-06-2015]
18 MARCH 2016

CRIMINAL PROCEDURE: *Trial – Discharge – Order of discharge not amounting to acquittal – Whether justified – Whether warranted by facts and circumstances – Whether more proper to discharge accused amounting to acquittal – Criminal Procedure Code, s. 254*

The appellant, who stood charged for an offence under s. 420 of the Penal Code, was given a discharge not amounting to an acquittal ('DNAA') under s. 254 of the Criminal Procedure Code ('CPC') by the Sessions Court Judge ('SCJ') following an application to the effect by the prosecution. The appellant contended that he ought, on the facts and in the circumstances, be given a discharge amounting to an acquittal, and hence, appealed against the order. Before the Judicial Commissioner, arguments were, *inter alia,* regurgitated that an order of acquittal was appropriate and warranted as (i) the dispute between the complainant and the appellant had been amicably settled; (ii) the police report lodged by the complainant had been withdrawn; (iii) a representation for the discontinuance of the charge had been made to the Attorney General; and (iv) there was no certainty whether the prosecution would or could proceed with the case in the near future. The primary issue that arose was whether on the facts and the evidence as was available to the court, the more proper order was for the appellant to be discharged amounting to an acquittal.

Held (allowing appeal; ordering discharge amounting to acquittal):

(1) Due to possible overlapping and inter encroachments of jurisdiction between the Judiciary and the prosecution, leading to incursions into each other's territory, two views on the issue at hand have since mushroomed, namely: (i) unless there are good grounds to the contrary, the discharge of an accused person should amount to an acquittal; and (ii) the discharge should not amount to an acquittal if the complainant is no longer interested in the complaint but that the prosecution is still interested in prosecuting the accused. (para 13)

(2) On the authorities, *inter alia,* of *Koh Teck Chai v. PP* and *PP v. Syed Abdul Bahari Shahabuddin*, the SCJ had misconstrued himself in saying that he had limited rights and powers to grant the appellant a full acquittal. (para 17)

(3) Under s. 254 of the CPC, at any stage of the trial, before the delivery of judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be

A acquitted. In other words, there is no necessity for the SCJ to consider further the viability of the charge but merely to acquit and discharge the accused after being so informed. (para 19)

(4) When the DPP in this case applied for an order of DNAA, he failed to give the court any good reasons or grounds for having such an order of
B DNAA. The DPP never informed the court below that the representation by the counsel was accepted by the Attorney General's Chambers, and nor was it indicated that the prosecution had wanted to still pursue the case against the appellant. Hence, the reflection shown was that the prosecution was not interested in pursuing the case.
C (para 20)

(5) There was justification for the SCJ to issue an order of discharge amounting to an acquittal in the circumstances of the case. This was so as: (i) no specific indications were given by the prosecution that they were pursuing the matter further; (ii) the prosecution, having applied for
D an order of DNAA, failed to give any good grounds for having the order of DNAA; (iii) there was nothing to indicate that the prosecution was able to proceed with the case for the time being or within a reasonable time; (iv) it was unlikely that the case could be prosecuted in the short future; and (v) it was not right to leave an individual with a charge
E hanging over him for an indefinite period. (para 23)

Case(s) referred to:

Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Datuk (Datu) Amir Kahar Tun Haji Mustapha v. Tun Mohd Said Keruak (Yang di-Pertua Negeri Sabah) & Ors [1994] 4 CLJ 656 HC ***(refd)***
F *Koh Teck Chai v. PP [1967] 1 LNS 72 HC* ***(refd)***
Kuppusamy v. PP [1948] 1 LNS 82 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
PP v. Lau Ngiik Yin [2008] 10 CLJ 410 HC ***(refd)***
PP v. Mat Zain [1948-1949] Supp MLJ 142 ***(refd)***
PP v. Suppiah Pather (Penang Criminal Revision No. 14 of 1951) (Unreported) ***(refd)***
G *PP v. Syed Abdul Bahari Shahabuddin [1975] 1 LNS 137 HC* ***(refd)***
PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(refd)***
Tan Ah Chan v. Regina [1955] 1 LNS 155 HC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***

Legislation referred to:

H Criminal Procedure Code, ss. 254, 376
Federal Constitution, art. 145(3)

For the appellant - Kumaraendran; M/s Kumar & Co
For the respondent - Noor Svetlana Mohd Noor Nordin & Wan Shahida, DPPs

Reported by Wan Sharif Ahmad

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JUDGMENT

Mohamad Shariff Abu Samah JC:

Background

[1] This is an appeal by the appellant against the decision of the learned Sessions Court Judge who had ordered a Discharge Not Amounting To An Acquittal under s. 254 of the Criminal Procedure Code. The decision was delivered and pronounced on 25 May 2015. Hence the appellant's appeal against the said decision, and the contention that he should be acquitted and discharged. Before I proceed to decide on this matter, let us look at the charge that was preferred against the appellant. The charge reads as follows:

> Bahawa kamu pada 11.4.2011 di TM Selvam Trading, Lot 284 Jalan Tiga Off, Jalan Chan Sow Lin di daerah Cheras, Wilayah Persekutuan, Kuala Lumpur telah menipu Armin Iskandar bin Abdullah No. KP: 721125-08-6259, untuk mempercayai bahawa kamu boleh membekalkan serta merta 10,000 Tan Metrik "Iron Ore Magnetite – Gred Minima 62 peratus daripada lombong milik syarikat kamu iaitu Glory Iron Mining Sdn. Bhd. Di Lot 27671 kawasan Sungai Gamoh Mukim Keratong Rompin Pahang dengan curangnya telah mendorong Armin Iskandar bin Abdullah menyerahkan wang deposit menerusi cek Public Bank No. 038338 Syarikat Arrow Multimode bernilai RM1,000,000 atas nama Tamil Chelvam a/l M. Ramasamy kepada kamu padahal kamu tahu kamu tidak boleh membekalkan "Iron Ore Magnetite – Gred Minima 62 Peratus yang diminta, yang mana Armin Iskandar bin Abdullah tidak akan berbuat demikian sekiranya tidak diperdayakan oleh kamu, dan dengan ini kamu telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 420 Kanun Keseksaan.
>
> **Hukuman**
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> Sabit kesalahan kamu boleh dipenjara selama tempoh tidak kurang daripada satu tahun dan tidak lebih dari sepuluh tahun dan dengan sebat dan boleh juga dikenakan denda.

[2] With the facts clarified, what is left is the legal issue at hand. The central crux and issue of this appeal is whether an order of Discharge Amounting To An Acquittal (DNA) should be given by the learned Sessions Court Judge based on the facts that the incident had arisen from a contract and is civil in nature. This fact was accepted by the Deputy Public Prosecutor. Evidence also showed that there was another negotiation for settlement between the complainant and the accused/appellant, whereby a settlement was made, and this resulted in the complainant withdrawing his police report, Salak South No: 22/13/13 dated 13 May 2015 that was made on 15 March 2013 by one Armin Iskandar Abdullah. With regard to the withdrawal of such report, a letter of representation was written on behalf of the accused/appellant to the Attorney General's Chambers. It was clearly stated in that letter of representation that the charge was to be withdrawn against the accused/appellant. What matters most was it was recorded in

court that such letter of representation was received by the prosecution and was accepted. Having had the facts in mind and within the purview of the prosecution, learned counsel for the appellant had submitted that in this circumstance the appellant should be Discharged Amounting To An Acquittal (DNA). Nevertheless it was turned down by the learned Sessions Judge who only ordered a Discharge Not Amounting To An Acquittal (DNAA).

Brief Facts

[3] At p. 10 of the appeal record, the learned Sessions Court Judge had narrated the scenario of the proceeding. Having perused the notes of proceeding at pp. 17 till 23 of the appeal record, I concluded as follows. On 18 February 2015, the appellant was charged with one charge above. The charge was first read and explained to the appellant and the appellant had claimed trial to the charge. On 28 April 2015, it revealed that there were some developments pertaining to the case between the appellant and the complainant and only then the DPP had on 14 May 2015, officially informed the court that the complainant had wanted to withdraw the report. On 25 May 2015, the DPP had (not) informed the court that the Attorney General's Chambers had received the representation from counsel and the representation was accepted. Later on, the DPP had requested for an order of DNAA.

Counsel For The Respondent's Submission

[4] The crux of learned counsel's arguments was that the facts showed that the complainant acknowledged the complaint was civil in nature. In view of that, the complainant on his own accord had withdrawn the police report. In support, the investigating officer of the case had taken a statement from the complainant confirming that he had withdrawn the police report. Pursuing the matter, a letter of representation was made by the appellant's counsel in that such complaint was civil in nature and that the case should be withdrawn. Such representation was accepted by the Attorney General's Chambers. Learned counsel argued that the learned Sessions Judge was evidently misconstrued in saying that "the courts have limited rights to grant DNAA, much less an acquittal". Furthermore, the complainant in this matter was no longer interested in pursuing the matter. Learned counsel for the appellant had submitted that without the presence or the evidence of the complainant, it was impossible for the respondent to proceed on with the trial *vis-à-vis* no evidence at all against the appellant. Furthermore, the DPP is in no certainly whether to proceed with the case.

[5] The learned DPP on the other hand had submitted that though the complainant was not interested to proceed on with his complaint and had withdrawn the police report, nevertheless there were some other evidence. The learned DPP has yet to seek for instruction. Having asked by the court,

the DPP is not very sure whether to proceed with the case. The DPP nevertheless maintained that an order of Discharge Not Amounting To An Acquittal (DNAA) is proper.

Decision Of The Sessions Court Judge

[6] The gist of the decision of the learned Sessions Court Judge are as follows:

(i) Article 145(3) of the Federal Constitution states that it is the Attorney General, being a Public Prosecutor, who has the power to institute, conduct or discontinue any proceeding for an offence other than proceedings before the Syariah court, a native court or a court martial; and

(ii) With respect to s. 376 of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor and shall have control and direction of all criminal prosecutions and proceedings, and that the court would be in no position to usurp the power of the prosecution, more so to order an acquittal. As such an appropriate order should be Discharge Not Amounting To An Acquittal (DNAA)

Findings And Decision

[7] This court had the privilege of reading the notes of proceeding, the grounds of judgment of the learned Sessions Court Judge, the appeal record and the submission of both parties and the authorities cited therein.

[8] Before going to the merit of the facts, it is best to state that the Federal Constitution, which is the supreme law of this land and of which statutory law must yield to, has enshrined in art. 145(3) as follows:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a Native Court or a Court Martial

[9] In *Long Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80; [1974] 2 MLJ 152, Lord Suffian LP had occasion to say when touching on this article at p. 158 para. A (right):

> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does wish to institute or to go with any criminal proceedings which he has decided to discontinue.

[10] Having read the above provisions together with s. 376 of the Criminal Procedure Code, the Attorney General being the Public Prosecutor shall have full control and direction of all criminal prosecutions and proceedings

A under the Code. Learned Sessions Judges who are partners in the machinery of justice are similarly clothed with the relevant power and authority for purposes of carrying out their duties. For the conduct of criminal cases, learned Sessions Judges must observe the procedures as laid down in the Criminal Procedure Code.

B **[11]** I wish to state that in arriving at my findings, I have entirely agreed with the learned Deputy Public Prosecutor and the learned Sessions Court Judge in that it is settled law that the power of prosecution will always lies in the Public Prosecutor. Though the complainant was not interested to pursue with the trial or proceeding, the court would not usurp the power of C the Public Prosecutor and Discharge the appellant Amounting To An Acquittal (DNA). Neither the complainant is vested with such power, as the power to discontinue will always lie in the Public Prosecutor and none others. As such, it was absurd to think that the learned Sessions Judge could brush aside the constitutional powers of the Attorney General.

D **[12]** Without going overboard, it is trite law that the provisions of the Constitution hold sway over any other laws (see: *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v. Tun Mohd Said Keruak & Ors* [1994] 4 CLJ 656; [1994] 3 MLJ 737 where even constitutional conventions could not override the express provisions of the Sabah Constitution). NS Bindra in *The Interpretation* E *of Statutes* in no uncertain terms said:

> The Constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The Executive, the Legislature and the Judiciary are all its creation, and derive their sustenance from it … While the F constitution is the direct mandate of the people themselves, the statute is an expression of the will of the Legislature only, though the Legislature is also the representative of the people. A Constitution is but a higher form of statutory law …
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> A written Constitution is to be interpreted and effect given to it as a paramount law to which all other laws must yield.

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[13] Due to the possible overlapping and inter encroachments of jurisdiction between the Judiciary and the prosecution and due to this misunderstanding leading to incursions into each other's territory, two views have mushroomed, namely:

H (a) Unless there are good grounds to the contrary, the discharge of an accused person should amount to an acquittal (see: *Public Prosecutor v. Suppiah Pather*, Penang Criminal Revision No. 14 of 1951, *Public Prosecutor v. Mat Zain* [1948-1949] Supp MLJ 142, *Tan Ah Chan v. Regina* [1955] 1 LNS 155; [1955] MLJ 218, *Tai Chai Keh v. Public* I *Prosecutor* [1948] 1 LNS 122; [1948-49] Supp MLJ 105b, *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43; [1992] 2 MLJ 632; and

(b) The other being that the discharge should not amount to an acquittal if the complainant is not interested as informed by the Public Prosecutor so long as the prosecution is still interested in prosecuting the accused.

[14] As regards (a) above, it is now established that an acquittal can only follow if the prosecution does not desire to pursue the matter further (see: *Public Prosecutor v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137; [1976] 1 MLJ 87, *Koh Teck Chai v. Public Prosecutor* [1967] 1 LNS 72; [1968] 1 MLJ 166, *Kuppusamy v. Public Prosecutor* [1948] 1 LNS 82 *(infra)*). As for (b), the above statement seemed to be the current established law. Therefore, when the complainant is not interested, without the latter hinting that the charge is groundless or is disinterested in pursuing the case further, the application should be allowed. In this scenario an order of Discharge Not Amounting To An Acquittal should be appropriate.

[15] In the case of *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100, the court stated that:

> The question which we have to answer here was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all …
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> Until the decision of Mohamed Azmi J (as he then was) in *Public Prosecutor v. Mohamed Said* [1984] 1 MLJ 50 it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v. Public Prosecutor* [1948] MLJ 25 held that the earlier stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *Public Prosecutor v. Goh Kee Chuan* [1967] 1 MLJ 174 and *Public Prosecutor v. Mahmud* [1974] 1 MLJ 85. This view was accepted by the Federal Court, whose judgment was delivered by Ong J in *Chu Chee Peng v. Public Prosecutor* [1973] 2 MLJ 35 …
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> In *Chu Chee Peng*'s case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of *autrefois acquit* should the accused be subsequently re-charged for the same offence. The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal:
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> (1) When after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (section 173(f));
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> (2) When because the main prop of the prosecution case has prematurely collapsed and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (section 254)

> Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge not amounting to an acquittal

[16] Having said this, to my mind, to pronounce an order of Discharge Amounting To An Acquittal, or Discharge Not Amounting To An Acquittal which is not in accordance with the requirements of the law, would tantamount to *ultra vires* the Constitution and the Code.

[17] Be that as it may, on the reverse side of the case above, this court had the privilege of referring to the case of *Koh Teck Chai v. Public Prosecutor* [1967] 1 LNS 72; [1968] 1 MLJ 166 as submitted by learned counsel:

> … the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our Courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned Magistrate should be varied so that the discharge should amount to an acquittal …

Based on the above authority, it is my finding that the learned Sessions Court Judge had misconstrued himself by saying that he had limited rights and power to grant a full acquittal when in fact it is otherwise.

[18] In another case of *Public Prosecutor v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137; [1976] 1 MLJ 87, AbdoolCader J (as he then was) stated that:

> … sub-section (iii) of Section 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs. It is settled law that unless there are good grounds to the contrary, a discharge under this provision should amount to an acquittal. Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not unsurmountable and that it proceed within a reasonable time. This seems to be the *raison d'etre* for the scheme providing for a discharge not amounting to an acquittal ...

Current Case Scenario

[19] Under s. 254 of the Criminal Procedure Code, at any stage of the trial, before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted. In other words there is no necessity for the learned Sessions Judge to consider further as to the viability of the charge but merely to acquit and discharge the accused after being so informed. Under this provision such discharge shall not amount to an acquittal unless the court so

directs. In other words, for him to be recorded to have been acquitted, it must be pursuant to the proactive act of the learned Sessions Judge who must so specify the details. Notwithstanding this supposed room given to the learned Sessions Judge, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

[20] Reverting to the present appeal, it is not disputed that the DPP had informed the court that the complainant wishes to withdraw his report. From the record of proceedings, when the Deputy Public Prosecutor applied for an order of Discharge Not Amounting To An Acquittal (DNAA), he had failed to give to the court any good reasons or grounds for having the order of DNAA. No other details had the DPP informed the court. Never did the learned DPP at any time inform the court below that the representation by learned counsel was accepted by the Attorney General's Chambers which clearly reflected that such case was civil in nature. The learned Deputy Public Prosecutor did not even indicate to the court of their intention either to pursue the case or otherwise against the appellant in due course. The reflection shown was that the prosecution was not interested in pursuing the case at any time. To my mind these reflect their seriousness not to proceed on with the trial.

[21] I am quite disagreeable with the learned Deputy on the issue of whether the prosecution had wanted to pursue the charge against the appellant and if so, when should they decided to do so. It is unjustifiable to question such power and prerogative. Nevertheless there are no certainties at all shown by the prosecution. In my mind, it is best to refer to the case of *Public Prosecutor v. Lau Ngiik Yin* [2008] 10 CLJ 410; [2007] MLJU 668. It was stated that:

> … in my view the court must order an acquittal and not DNAA, when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and it is unlikely the case can be prosecuted expeditiously in the short future. This is so because the liberty of His Majesty's subject cannot be placed by a continuous threat by the prosecution by only an order of discharge. Such an order may be against constitutional guarantees …

[22] Pursuing the law further, with the learned Sessions Judge being subservient to the superior constitutional power of the Attorney General with regard to its inability to discharge an accused person amounting to an acquittal, compounded by all the above discussed reasons, a legal issue worth considering is whether the learned Sessions Judge has the inherent powers to do so. At the outset the answer is in the negative. Nevertheless to say that the decision and powers of the Public Prosecutor is immutable and cannot be questioned by the court is a proposition unsustainable under the Federal Constitution. To quote the words of a judge in the above case:

A … this court is the Supreme Arbiter of what is, right and wrong. Any public decision maker is always subject to judicial scrutiny. Ordinarily a challenge on the decision of any public decision maker is done by way of proper application within the concept of judicial review. That does not necessarily mean that the court has no powers or jurisdiction at any time to exercise its prerogative powers, when justice demands … such
B prerogative powers will only be exercised in extreme situation either when it is necessary and essential to protect and safeguard the Federal Constitution and/or where the spirit and intent of the Federal Constitution is violently breached by the public decision maker …

[23] To conclude on the matter at hand, there was justification for the
C learned Sessions Judge to issue an order of Discharge Amounting To An Acquittal in the circumstances of the case when:

(a) there was no specific grounds or reasons or indications propounded by the prosecution that they are not pursuing the matter further;

D (b) the prosecution having applied for an order of DNAA had failed to give any good grounds for having the order of DNAA;

(c) there was nothing to show that the prosecution is able to proceed for the time being or proceed within a reasonable time;

E (d) it is unlikely that the case can be prosecuted expeditiously in the short future; and

(e) it would not be right to leave an individual for an indefinite period with a charge hanging over him.

[24] In the upshot, I find there are special reasons and valid grounds for a
F discharge and acquittal order. The case was left hanging over the appellant's mind for quite some time and there is no evidence that the prosecution had decided to prosecute the case within a reasonable time. By virtue of the above reasons I had no hesitation to allow this appeal and order for the appellant to be Discharged Amounting To An Acquittal (DNA).

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